LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 12 1971
ROBERT SEAVER, CLERK

In The

Supreme Court of the United States

October Term, 1971

No. 71–

71-660

JOHN V. TATUM and PATRICIA TATUM,

Petitioners,

- against -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IRVING ANOLIK
Attorney for Petitioners
225 Broadway
New York, New York 10007
(212) RE 2-3050

(4805) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 New York, N.Y. (212) 565-6377 Philadelphia, Pa. (215) 563-5587

INDEX TO BRIEF

Page

Statement 1

Opinion Below 2

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions . . . 3

Statement of Case 3

Introductory 3

The Government's Case 7

The Defense 11

Argument:

Point I. Government agents conducted an exploratory search of a co-defendant, Veda Frasier, as a result of which a quantity of narcotics was seized. There was no probable cause for this search and seizure but, nevertheless, the government predicated this violation of the Fourth Amendment as a basis for a search warrant to search certain premises in Manhattan registered in the name of "J. Tatum." No incriminatory evidence was ever adduced against petitioner, Patricia Tatum (the mother of four

Index

Page

children) until after a subsequent unlawful search and seizure of the residence in Queens, New York, which she shared with petitioner, John V. Tatum. 12

Point II. The petitioners were charged with "possession" of narcotics in the Southern District. The Court below, however, in essence, declared that they lacked "standing" to move to suppress this evidence although a possessor ordinarily should enjoy this right. There is a conflict between the the circuit courts on this subject. Evidence seized in the Eastern District was erroneously received. 16

Conclusion 19

Table of Citations

CASES CITED:

Bourg v. United States, 286 F.2d 124 (C.A. 5th, 1960) 17

Chimel v. California, 395 U.S. 762 14

Contreras v. United States, 291 F.2d 63 (C.A. 9th, 1961) 17

Jones v. United States, 362 U.S. 257 17

Index

Page

Lewis v. United States, D.C. N.Y., 1967, 270 F. Sup. 807 17

McDonald v. United States, 335 U.S. 451. . . . 17

Niro v. United States, 388 F.2d 535, 537 (C.A. 1st, 1968) 17

People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 18

United States v. Brown, D.C.N.H. 1969, 300 F. Sup. 1285 17

United States v. Mullen, 329 F.2d 295 (C.A. 4th, 1964) 17

United States v. Rosenberg, 416 F.2d 680, C.A. 7th, 1969 17

RULES AND STATUTES CITED:

Federal Rules of Criminal Procedure Rule(e) 3

21 U.S.C. Sec. 173 . . . . . 1, 3

21 U.S.C. Sec. 174 . . . . . 1, 3

28 U.S.C. Sec. 1254(1) 2

Index

Page

UNITED STATES CONSTITUTION CITED:

Fourth Amendment 3, 12

Fifth Amendment 3

APPENDIX

Judgment of Affirmance of the United States Court of Appeals 1a

First Order on Reconsideration and Rehearing 2a

Second Order on Reconsideration 3a

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971
No. 71 -

- -x
JOHN V. TATUM and PATRICIA TATUM,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

- -x

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

The petitioners herein, jointly and severally, pray that this Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit which affirmed judgments of the United States District Court for the Southern District of New York, convicting each of the petitioners of three counts of a six-count indictment charging violations of the Federal Narcotics Laws (21 U.S.C. Sec. 173 and 174). Each petitioner was sentenced to ten years imprisonment and a fine.

Opinion Below

The United States Court of Appeals rendered no written opinion.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U.S.C., Sec. 1254(1). The Court of Appeals for the Second Circuit affirmed the judgments of conviction against each petitioner on the 24th day of September, 1971 without opinion. A petition for rehearing was denied October 15, 1971.

Questions Presented

1. Whether a warrantless search of Petitioners' Queens New York house about 24 hours after the acquisition of probable cause by the government violated their Fifth and Fourth Amendment rights, particularly in view of the fact that it was not incident to an arrest?

2. Whether the Courts below erred in denying "standing" to petitioners to suppress evidence seized from a third defendant (Veda Frasier, not tried with petitioners) despite the fact that they were charged with "possession" of that evidence (drugs).

2a. May a defendant charged with "possession" of drugs ever be denied "standing" to move to suppress that evidence as happened in the case at bar?

3. The police saw Petitioner John V. Tatum pass a bag to a co-defendant (Veda Frasier), on a public street, the contents of which were unknown.

Was it a violation of petitioners' Fourth Amendment rights to conduct a patently illegal exploratory search and seizure of Frasier's person and the bag in order to obtain evidence against petitioners, and then to deny them a right to move to suppress despite the fact that they were jointly charged with Possession of these drugs along with Frasier?

4. Whether incriminating utterances made by the petitioners following an unlawful search and seizure in their Queens residence must be suppressed as a "poisoned fruit" of the illegal invasion of privacy?

5. Since the petitioners were only charged with possession of drugs in the Southern District, was it proper to permit the government to introduce evidence of drugs seized in the Eastern District of New York?

Constitutional and Statutory Provisions

The Fourth and Fifth Amendments of the United States Constitution are involved as is Rule 41(e), Federal Rules of Criminal Procedure and 21 U.S.C. 173, 174.

Statement of Case

Introductory

The primary issues in this case involve searches and seizures and search warrants. The case could not have been presented nor could arrests have been made, it is submitted, were it not for the

unlawful searches and seizures conducted by the authorities in this case.

JOHN TATUM was a heroin addict although PATRICIA TATUM was not addicted at all, and was the mother of four children. There is no evidence in the record to indicate that the appellants herein are husband and wife. That they live together at a home located at 118-15 235th Street, Cambria Heights, Queens, New York is apparently established.

On the other hand, there is no evidence whatsoever that the defendants lived at another location in Manhattan namely 45 West 132nd Street, Apartment 9P.

Apparently intermittent surveillance was conducted of JOHN TATUM between February 16, 1970 and March 20, 1970, the latter day being the day of the arrest.

Taking the evidence most favorable to the government at the present time, it is manifest from the record that nothing whatsoever was observed before the evening of March 19th, 1970 that indicated that the defendants-appellants were committing crimes. It was alleged, however, by a detective, D'Ambrosio, that he observed the appellants driving in a car in the late evening, close to midnight of March 19, 1970. He saw JOHN TATUM park this car in the middle of the block on West 115th Street between 7th and 8th Avenues in Manhattan. He left the car leaving the appellant PATRICIA TATUM seated therein, and went to the Madrid Bar.

There he met a woman later identified as VEDA FRASIER who was named as one of the defendants in this case.

The two engaged in a conversation and proceeded towards the parked car. When they neared the vehicle, however, VEDA FRASIER stopped and waited on the sidewalk while JOHN TATUM continued to the car, entered it and about 30 seconds to one minute later emerged and walked back to VEDA FRASIER receiving money from her and handing her a pocket sized brown paper bag. It is extremely significant to note that absolutely nothing could be seen inside the bag at this point. The police officer who claimed that he observed this transaction was unaware of what the bag contained.

There was no attempt to make any arrest at this time. Instead the police permitted VEDA FRASIER to enter a taxi cab and then pick up a man later identified as CRAWFORD ANDERSON and proceed to drive many blocks away. The taxi cab was stopped and the defendant FRASIER was arrested and the contents of the brown paper bag were examined without a warrant. Apparently it was later determined that the contents consisted of heroin.

This is the entire basis upon which the search warrant for Apartment 9P at 132nd Street was issued, and it is also the basis upon which the arrests of the appellants herein were justified.

It is to be noted that there was no informer indicating that heroin was in fact contained in the bag and there are no observations other

than the officer seeing a brown paper bag being exchanged for some currency. The officer did state, however, that he was aware that JOHN TATUM did have a prior arrest record and convictions involving narcotics.

It is respectfully submitted that as a matter of law there was insufficient evidence to conduct any searches or to make any arrests including that of VEDA FRASIER.

The officers, it must be recognized, maintained that they felt they had probable cause to arrest VEDA FRASIER and to search her person and the brown paper bag. There was no claim that this was an "exploratory" search, although it clearly was.

With respect to PATRICIA TATUM, it must be noted that there is no evidence at all that she was ever in contact with VEDA FRASIER or that she ever entered Apartment 9P of the house at 132nd Street or that she personally was ever in possession of any drugs whatsoever.

It is respectfully submitted that the facts herein reveal a flagrant violation of the Fourth Amendment. The trial court held a hearing on a motion to suppress but denied the relief sought. It did suppress certain evidence obtained from the house in Cambria Heights in Queens, although not all of that evidence. With respect to the search of apartment 9P at 45 West 132nd Street, the Court permitted all of that evidence to be admitted.

It should be noted that although a trial commenced, a mis-trial had to be declared because of

the physical condition of JOHN TATUM who was suffering from the withdrawal symptoms of a heroin addict. In addition a superseding indictment was handed up at the very eve of trial and a ten day postponement was granted to make motions. The new indictment presumably was based exclusively upon hearsay.

Finally it should be noted that the officers who arrested PATRICIA TATUM at her home in Cambria Heights, Queens, did not bother to get an arrest warrant even though almost 24 hours had elapsed since the arrest of VEDA FRASIER and the observations on 115th Street. The object was manifest, namely that the officers sought a rummaging search of the house in Queens on the pretext that it was "incidental" to a lawful arrest.

The Government's Case

On the motion to suppress and to controvert, the government called LOUIS D'AMBROSIO, a detective attached to the New York City Police Department but working with the Joint Task Force. He testified that on March 20, 1970, he submitted an affidavit to Commissioner Clayton Hallinger, and obtained a search warrant to search the premises known as Apartment 9P at 45 West 132nd Street in Manhattan. The officer declared that he based this upon observations which he had made in the very late evening on the 19th of March, 1970, and about 12:05 A.M. in the early morning of March 20, 1970, on 115th Street between 7th and 8th Avenues in Manhattan.

D'Ambrosio declared that he observed the defendant-appellant JOHN TATUM accompanied

by PATRICIA TATUM drive up to 115th Street in Manhattan and park in the middle of the block between 7th and 8th Avenues close to midnight of the 19th of March, 1970 (53a — 60a).[1] He then saw the defendant-appellant JOHN TATUM leave the vehicle and enter the Madrid Bar where he met another person later known as VEDA FRASIER and both of them left the bar and were conversing for awhile. They left the bar and walked toward the parked car in which co-appellant PATRICIA TATUM was sitting. FRASIER stopped in the middle of the block and appellant JOHN TATUM returned to the car, sat in the front seat for a few moments and then left and returned to FRAZIER whom he handed a brown paper bag in exchange for some currency (55a).

The officer, however, stated that he did not know what was in the brown paper bag at the time.

He then observed VEDA FRASIER get into a taxi cab, drive a short distance at which time she was joined by a male later identified as CRAWFORD ANDERSON and the two proceeded several more blocks distance. No arrest was made on 115th Street. When the cab reached 132nd Street and Lenox Avenue, the cab was halted and VEDA FRASIER was placed under arrest. The contents of the bag were opened and apparently later on it was determined after chemical analysis, we assume, that it contained heroin (55a-59a).

In seeking the search warrant for apartment 9P, at 45 West 132nd Street, the officer admitted

---

1. Numbers in parenthesies refer to pages in the appendix.

that he never told the Commissioner that he had arrested VEDA FRASIER on 132nd Street and Lenox Avenue and not on 115th Street. He did not tell the Commissioner that VEDA FRASIER had another male with her in the taxi cab. Finally, he admitted that he did not tell the Commissioner that VEDA FRASIER was in a public taxi cab when she was arrested (62a — 66a).

Officer D'Ambrosia admitted that he never saw either of the appellants ever enter Apartment 9P of 45 West 132nd Street, nor did he have any knowledge that any contraband or dope was contained in that apartment. Apparently Apartment 9P was unoccupied. At the time the search ultimately did take place, the appellants were in Queens and not in Manhattan (70a — 78a, 80a — 82a).

In pursuing the taxi cab incidentally, the officers admitted that they lost sight of the brown paper bag and did not know what happened to it or whether it was empty or full or whether something was put into it or taken out of it during the taxi ride. The Commissioner was never told that the arrest took place inside a public taxi. Whether or not the public taxi itself was empty at the time is unknown. Whether the brown paper bag or another brown paper bag or something containing heroin was in the taxi cab is unknown. The officer did not even have the name or license number of the taxi cab driver or his cab (136a — 138a).

Officer D'Ambrosia further declared that prior to the 19th of March, 1970, no one had ever mentioned the possibility of contraband or narcotics at 45 West 132nd Street, Manhattan (78a — 85a).

The arrest of the appellants herein was admittedly effectuated almost twenty-four hours later, that is subsequent to the arrest of VEDA FRASIER (143a — 144a).

D'Ambrosio admitted that in the interim he had appeared before a United States Commissioner and had told the United States Attorney about what happened, but he obtained neither an arrest nor a search warrant for the Tatums or for the Cambria Heights house (144a-146a).

JAMES JOHNSON, who was one of the officers who participated in the surveillance along with Detective PATRICK CAMPBELL stated that when they arrested JOHN TATUM he said "if I had my piece, I would have killed you all" (156a).

At about 11:30 P.M. on the 20th of March, 1970, the officers went to the Cambria Heights Home where the defendants-appellants lived, and JOHN TATUM was arrested outside of the premises. There was no search warrant for the premises (157a-159a).

Johnson stated that he yelled out that PATRICIA TATUM was under arrest and asked her to open the door. He stated he heard footsteps and then broke in (159a-161a).

Patrolman Neibling found a gun upstairs (167a).

Officer James Harris stated that he searched under a kitchen cabinet in the basement and found a jar with white powder. He also seized a protective face mask (170a-172a).

Patrolman John De Rosa stated that he too entered the house in Cambria Heights on the 20th of March, 1970, and inside the house he found a number of envelopes filled with a white powder as well as a blue metal box and a plastic bag containing white powder. He also found a number of glassine envelopes (181a-188a).

Peter Wilcocki, a special agent with the Bureau of Narcotics also was present during the search.

The Court found that the appellant PATRICIA TATUM had made a statement to the effect that she had made $75,000.00 on the "stuff" this year and knew she would go to jail so "I enjoyed every minute of it". She also allegedly told Detective D'Ambrosia that "if she was to be caught, she lived good, so whatever the consequences were, she could take it"

There was no apparent reason why the detectives did not get a search warrant for the search of the house in Queens. The Court at the beginning of the case was very disturbed over the fact that no effort had been made to obtain a search warrant for this purpose although almost a full twenty-four hours had elapsed.

The Defense

Neither of the appellants took the stand in their own behalves nor did they call any witnesses.

Argument

Point I.

GOVERNMENT AGENTS CONDUCTED AN EXPLORATORY SEARCH OF A CO-DEFENDANT, VEDA FRASIER, AS A RESULT OF WHICH A QUANTITY OF NARCOTICS WAS SEIZED. THERE WAS NO PROBABLE CAUSE FOR THIS SEARCH AND SEIZURE BUT, NEVERTHELESS, THE GOVERNMENT PREDICATED THIS VIOLATION OF THE FOURTH AMENDMENT AS A BASIS FOR A SEARCH WARRANT TO SEARCH CERTAIN PREMISES IN MANHATTAN REGISTERED IN THE NAME OF "J. TATUM." NO INCRIMINATORY EVIDENCE WAS EVER ADDUCED AGAINST PETITIONER, PATRICIA TATUM (THE MOTHER OF FOUR CHILDREN) UNTIL AFTER A SUBSEQUENT UNLAWFUL SEARCH AND SEIZURE OF THE RESIDENCE IN QUEENS, NEW YORK, WHICH SHE SHARED WITH PETITIONER, JOHN V. TATUM.

The facts of this case are quite shocking. Government agents had been conducting an intermittent surveillance of petitioner, JOHN V. TATUM, for a number of weeks. On the trial, these agents conceded that they never had any evidence that he was dealing in narcotics. At most they had a suspicion or a hunch.

Early in the morning of March 20th, JOHN V. TATUM, driving in an automobile with his common-law wife, petitioner, PATRICIA TATUM, stopped in Harlem and leaving his wife in the car, proceeded to the Madrid Bar. There he met VEDA FRASIER, (a co-defendant who was unavailable

during the trial of the petitioners) to whom he handed a bag, the contents of which government agents were completely unaware.

The petitioner, JOHN V. TATUM, then rejoined his wife, PATRICIA TATUM, and in the meantime, co-defendant, VEDA FRASIER, hailed a taxi cab, was joined by another unknown male by the name of CRAWFORD ANDERSON, drove many blocks distant and was finally stopped and placed under arrest by government agents. No arrest had been attempted at the time the bag was delivered. The agents opened the bag, and, after chemical analysis, later found that it contained heroin. The name and identity of the cab driver was unknown and it was never disclosed. There was no knowledge as to whether or not CRAWFORD ANDERSON had any heroin with him. The bag was not kept in sight.

There was obviously no probable cause for arrest in this case, let alone a search. There is no other way of describing it, except as a deliberate and premeditated "exploratory" search.

It was impossible to determine whether or not the bag which was seized in the cab many blocks distant from the meeting with petitioner, JOHN V. TATUM, was the same bag which TATUM had given to FRASIER. Moreover, it was, of course, impossible to tell whether or not, assuming that it was the same bag, that it contained anything such as heroin when delivered.

Nevertheless, based upon this unlawful search and seizure, the authorities then obtained a search warrant to search premises 45 West 132nd Street,

Apartment 9P. The petitioners were never seen entering that apartment. Petitioner, PATRICIA TATUM, had never been seen entering the building. There was a telephone with an unlisted number which supposedly was registered in the name of JOHN V. TATUM. The government admitted that this premises in Manhattan was not the residence of the petitioners (A10).

About twenty-four hours later, the government agents arrested JOHN V. TATUM outside of his residence in Queens (118-15 235th Street).

Although there was absolutely no evidence as to dealing in narcotics, so far as PATRICIA TATUM was concerned, the agents, without a search warrant, broke into the house and proceeded to rummage throughout the dwelling. PATRICIA TATUM was taking a bath and was completely naked at the time that she was found, and placed immediately under arrest. According to the testimony of the government agents, while supposedly seeking PATRICIA TATUM, the agents discovered certain narcotics in places in her home where it would have been impossible for an adult female to hide (in a cabinet under a basement sink, for example).

The trial court permitted the introduction into evidence of everything found prior to the time of the arrest of PATRICIA TATUM, but suppressed any items allegedly found after that arrest on the basis of Chimel v. California, 395 U.S. 762.

The government admitted that it had almost twenty-four hours time within which to apply for a search warrant following the search and seizure

in the Manhattan apartment and prior to the arrest of PATRICIA TATUM and the search of her dwelling. No effort whatsoever was made to obtain a search warrant or an arrest warrant.

The government agents apparently relied upon their assumption that where a narcotics case is involved, an arrest may be made without a warrant. The government successfully argued that no search and seizure had been involved prior to the apprehension of petitioner, PATRICIA TATUM, in the bathtub because the items uncovered were discovered in "plain view" during the quest for PATRICIA TATUM. The fact that items were found in places where it would have been impossible for an adult female to hide, was completely ignored by the Courts below, basing their determinations upon the agents' declarations that everything they found had been in plain view during their rummaging through the house trying to find PATRICIA TATUM.

It is submitted that no entry into the house at all was permissible without a search warrant. Moreover, there was no probable cause whatsoever for the arrest of PATRICIA TATUM, and thus nothing could be justified under the doctrine of a search incident to a lawful arrest.

We must bear in mind, however, that the search herein was not "incident" to an arrest, since the search allegedly occurred while looking for PATRICIA TATUM and not after her arrest. This raises the serious question as to whether or not agents may deliberately delay making an arrest so that they may first conduct a rummaging

type of search and seizure without traducing the Fourth Amendment. The acceptance of such a premise would render the Fourth Amendment virtually worthless.

Point II.

THE PETITIONERS WERE CHARGED WITH "POSSESSION" OF NARCOTICS IN THE SOUTHERN DISTRICT. THE COURT BELOW, HOWEVER, IN ESSENCE, DECLARED THAT THEY LACKED "STANDING" TO MOVE TO SUPPRESS THIS EVIDENCE ALTHOUGH A POSSESSOR ORDINARILY SHOULD ENJOY THIS RIGHT. THERE IS A CONFLICT BETWEEN THE CIRCUIT COURTS ON THIS SUBJECT. EVIDENCE SEIZED IN THE EASTERN DISTRICT WAS ERRONEOUSLY RECEIVED.

The indictment herein charged "possession" of narcotics by both petitioners along with a co-defendant, VEDA FRASIER, in the Southern District of New York (actually "receive, conceal, sell") (2A-6A).

The facts indicate that the government agents witnessed petitioner, JOHN V. TATUM, transfer a bag, the contents of which admittedly were unknown to the authorities, to VEDA FRASIER on a public street in Harlem.

The agents were clearly seeking to obtain evidence against petitioner, JOHN V. TATUM. Instead of effectuating an arrest at the moment of transfer (which would have been invalid since there was no probable cause), the surveilling agents followed VEDA FRASIER a number of blocks after she left JOHN V. TATUM and had hailed a cab.

They then stopped the taxicab and, without benefit of an arrest warrant or search warrant, seized the bag, opened it, and determined that it contained heroin. Based upon this, the petitioners were charged, inter alia, with "possession" of these narcotics. In addition, this seizure became the justification for obtaining a search warrant of the 132nd Street premises listed in the name of "J. TATUM".

As "possessors", constructively or actually, they certainly had "standing". (McDonald v. United States, 335 U.S. 451; Jones v. United States, 362 U.S. 257; Niro v. United States, 388 F.2d 535, 537 (C.A. 1st, 1968); United States v. Mullin, 329 F.2d 295 (C.A. 4th, 1964); Contreras v. United States, 291 F.2d 63 (C.A. 9th, 1961); Bourg v. United States, 286 F.2d 124 (C.A. 5th, 1960); Lewis v. United States, D.C. N.Y., 1967, 270 F. Sup. 807; also, see United States v. Rosenberg, 416 F.2d 680, C.A. 7th, 1969 and United States v. Brown, D.C. N.H. 1969, 300 F. Sup. 1285).

In Niro v. United States, the First Circuit clearly explained the dilemma in which appellants are now placed and for which they are suffering 10 years imprisonment and fines (388 F.2d at 537);

> "With due respect, we do not think that the principle established by Jones is to be read so narrowly. It is still 'squarely contradictory' for the government to charge out of one side of its mouth that the defendant had possession, even though in addition to possession the government must ultimately prove other matters, and to say

> out of the other that defendant, as movant, lacks standing because he did not have possession."

The government agents were clearly seeking incriminatory evidence against the petitioners when they seized the bag from VEDA FRASIER. They then charged the petitioners with a possessory crime. They, however, insisted that not withstanding this paradox, the petitioners, though charged as possessors, lacked "standing" to suppress this evidence because they were "not" possessors.

The First Circuit in Niro, supra, clearly indicates that this is inconsistent with common sense and with the law as it should be interpreted.

This Court should certainly declare that one charged with possession must be given the right to move to suppress such evidence. Otherwise, deliberate and obvious illegal searches and seizures of an exploratory nature may be made solely to incriminate hapless persons, such as the TATUMS, who would be left without any remedy at all (cf: People v. Martin, 45 Cal. 2d 755, 290 P.2d 855).

It was improper and contrary to the indictment to permit evidence seized in the Eastern District to be received (i.e., the drugs seized sans warrant from Petitioners' Queens, N.Y. house).

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK and
BOBICK, DEUTSCH & SCHLESSER
Attorneys for Petitioners

IRVING ANOLIK,
Of Counsel.

APPENDIX

Judgment of Affirmance of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of September, one thousand nine hundred and seventy-one.

Present:

Hon. Henry J. Friendly,
Chief Judge,
Hon. William H. Mulligan,
Hon. William H. Timbers,
Circuit Judges.

- -x

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN V. TATUM and PATRICIA TATUM,

Defendants-Appellants.

- -x

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District

Judgement of Affirmance of the United States Court of Appeals

Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

R. DANIEL FUSARO
Clerk

First Order on Reconsideration and Rehearing

71-1518

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- -x

United States of America,

Plaintiff-Appellee,

v.

Veda Frasier, et al.,

Defendants,

John V. Tatum and Patricia Tatum,

Defendants-Appellants.

- -x

First Order on Reconsideration and Rehearing

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate and to continue bail pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellants John V. Tatum and Patricia Tatum,

Upon consideration thereof, it is

Ordered that said petition for rehearing be and it hereby is denied. The motion to continue bail pending application for certiorari is denied with respect to John V. Tatum but is granted with respect to Patricia Tatum, subject to compliance with FRAP 41(b).

s/ Henry J. Friendly
HENRY J. FRIENDLY Chief Judge

s/ William H. Mulligan
WILLIAM H. MULLIGAN USCJ

s/ William H. Timbers
WILLIAM H. TIMBERS USCJ

October 15, 1971.

Second Order on Reconsideration

71-1518
71-1519

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the

Second Order on Reconsideration

United States Court House, in the City of New York, on the twenty-seventh day of October, one thousand nine hundred and seventy-one.

[Same Title]

By notice of motion dated October 21, 1971, the appellee has moved for reconsideration of the order of this court filed October 15, 1971, which continued bail as to Patricia Tatum only, pending application to the Supreme Court for a writ of certiorari, pursuant to F.R.A.P. 41(b). In light of Judge MacMahon's findings in denying bail pending appeal to this court, in light of this court's affirmance of Judge MacMahon's denial of bail on May 18, 1971 and in light of Justice Harlan's refusal, on June 30, 1971, to disturb these decisions, the motion of appellee for reconsideration is granted, and it is ordered that the motion of appellant for bail for Patricia Tatum be and hereby is denied.

s/ Henry J. Friendly
HENRY J. FRIENDLY Chief Judge

s/ William H. Mulligan
WILLIAM H. MULLIGAN USCJ

s/ William H. Timbers
WILLIAM H. TIMBERS USCJ

LIBRARY
SUPREME COURT, U.S.

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN V. TATUM and PATRICIA TATUM, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-660

JOHN V. TATUM and PATRICIA TATUM, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the Southern District of New York, petitioners were convicted on two counts of having facilitated the concealment and sale of heroin and one count of conspiracy to do so, in violation of 21 U.S.C. (1964 ed.) 174. Both received concurrent prison sentences of ten years and a $10,000 fine on each count. The court of appeals affirmed without opinion.

The evidence showed that in February 1970, agents of the Joint Federal Narcotics Task Force established

surveillance of petitioner John Tatum, who was known to have prior state and federal convictions for narcotics offenses (H. 13-17, 20-21).[1] Throughout the period of surveillance, John Tatum was frequently observed late at night driving from his residence in Queens to an apartment maintained by him in Manhattan. He was often observed leaving the Manhattan apartment with packages and paper bags which he then distributed at various bars and hotels in Harlem (H. 16-18, 21-26, 28-33; T. 36). John Tatum was at times accompanied by his wife, petitioner Patricia Tatum (H. 23, 30-31; T. 36, 54-55).

On March 20, 1970, just after midnight, the Tatums drove to a Manhattan bar. Patricia remained in the automobile while John entered the bar, emerging a short while later with Vera Frazier (H. 14, 123-124). John Tatum spoke with Frazier for a short period, returned to the automobile, and then rejoined Frazier, handing her a brown paper bag and receiving from her money in bill form (H. 15, 124-125).

Following the departure of petitioners, Vera Frazier placed the bag in the right hand pocket of her coat (H. 18). She then entered a cab, which stopped after a while to admit Crawford Anderson. At this point, agents approached the cab and, as they identified themselves, Frazier took the paper bag from her coat and attempted to stuff it behind the seat of the car (H. 18-20, 125). One agent seized the bag, which contained a substance later identified as heroin (H.

---

[1] "H." refers to the transcript of the hearing on the motion to suppress, and "T." refers to the transcript of the trial proceedings.

19; T. 164-165), and placed Frazier and Anderson under arrest (H. 19-20; T. 13).[2]

On the same day, a search warrant was obtained for the Tatums' Manhattan apartment. That search resulted in the recovery of a quantity of heroin as well as narcotics packaging materials (T. 128, 130, 136, 145-146, 165). At the same time, surveillance was established at petitioners' residence in Queens. Shortly before midnight, John Tatum was arrested as he drove away from the house (H. 62-63). As he was placed under arrest, he stated: "If I had my piece [gun], I would have killed you all" (H. 57, 63, 107; T. 74). After the arrest, petitioner was fully advised of his rights (T. 86). He informed the agents that Patricia Tatum was in the house, but refused to assist them in gaining entry (H. 106-107).

Agents then proceeded to the house, knocked on the door and heard footsteps coming to the door. After announcing that they were the police and informing Patricia Tatum that she was under arrest, they heard someone running and thereupon forcibly entered the house (H. 64-65). The officers fanned out in an attempt to locate petitioner. Two officers went to the basement, where they saw in an open cabinet a pot with a plastic bag containing what was later determined to be quinine hydrochloride and a can containing manitol (H. 76-78, 89).[3] One of the agents opened

---

[2] Frazier was indicted with petitioners. After her arrest, she was released on bail and is presently a fugitive.

[3] Quinine and manitol are common dilutants for pure heroin (Tr. 164-165).

the door of a closet and observed a plastic bucket filled with numerous glassine bags containing 330 grams of heroin (H. 78, 89-90; T. 165). The agents then left the basement and returned to the main floor where they observed Patricia Tatum in the custody of other agents (H. 78-79, 90, 108). After the arrest was effected, the agents searched the premises and seized a quantity of cocaine, a box containing heroin, a revolver, empty glassine envelopes, envelopes containing white powder and travelers' checks (H. 92-93, 100, 104, 115, 117, 119; T. 165). The items discovered after the arrest were suppressed as unlawfully seized while those discovered during the course of the search for Patricia Tatum were admitted into evidence (H. 118, 132, 136).

After Patricia Tatum was arrested, she was advised of her rights (T. 47-49, 88-89). She thereafter stated to agents, "I made $75,000 on the stuff this year, and I knew I would go to jail, so I enjoyed every minute of it" (T. 50, 89). She also asked an agent how much money he made last year and when he responded "approximately $15,000", she replied: "I made five times that amount" (T. 77).

The various contentions raised by petitioners are without merit. Their argument that the agents conducted an unlawful search of petitioners' residence after Patricia Tatum's arrest was conceded by the government below (H. 134-135), and those items seized as a result were suppressed, in accordance with this Court's decision in *Chimel* v. *California*, 395 U.S. 752. However, the district court properly concluded that the evidence discovered during the search

for Patricia Tatum was lawfully seized and admissible. *Warden* v. *Hayden*, 387 U.S. 294; *United States* v. *Thweatt*, 433 F. 2d 1226 (C.A. D.C.); *United States* v. *Pino*, 431 F. 2d 1043 (C.A. 2).

There is no reason for this Court to consider petitioners' claim that they were denied standing to object to the introduction into evidence of heroin seized from Vera Frazier since this argument was not made before either the district court or the court of appeals.[4] See, *e.g.*, *Lawn* v. *United States*, 355 U. S. 339, 362, n. 16. In any event, the arrest of Vera Frazier and the seizure of narcotics on her person was lawful since the arresting agents had only shortly before witnessed circumstances which amply supported the inference that a felony, *i.e.* the sale of narcotics, had been committed in their presence. Therefore, no warrant was required to effect the arrest. *Draper* v. *United States*, 358 U. S. 307; *United States* v. *Jamison*, 395 F. 2d 716 (C.A. 2), 26 U.S.C. 7607(2). Petitioners also suggest (Pet. 15) that the arrest of Patricia Tatum was not supported by probable cause. As the district court found, however (H. 131-132), the agents were justified in concluding from their observations of the sale of narcotics to Frazier that Patricia Tatum was aware of the sale and had participated in it with John Tatum.

---

[4] In fact, petitioners did object to the introduction into evidence of the heroin seized from Frazier on the grounds that there was no evidence to show that the bag seized was the same one Frazier had received from John Tatum. The objection was overruled, without comment (T. 34). Moreover, the circumstances surrounding the arrest of Frazier were fully explored by defense counsel (T. 19-34).

Petitioners' contention that evidence seized in the Eastern District of New York should not have been received at trial in the Southern District was not raised below and is frivolous. The contention that evidence of certain incriminating utterances should not have been admitted (T. 41-43, 47-50) was also not raised on appeal. In any event, as the facts set forth above make clear, the statements proffered by both petitioners at the time of their arrests, and with respect to Patricia Tatum, after she had been advised of her rights, were voluntary and unsolicited and thus were properly received in evidence.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 452399 37-